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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-7537

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Petitioner,

against

SUN SHIPBUILDING AND DRY DOCK COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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December 9, 1971

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutory Provision Involved	2
Statement of the Case	3
The Contract Involved in the Dispute	3
The Dispute	6
Decisions Below	8
Other Proceedings Pending Before MarAd	10
REASONS FOR GRANTING THE WRIT:	
The decision below conflicts with decisions of this Court and other Courts of Appeals, and if allowed to stand will permit the circumvention of the administrative disputes procedures prescribed in a standard form of government contract to the detriment of an industry vital to the economic interests of the nation	11
Conclusion	20
APPENDIX 1—Opinion and Judgment of the United States Court of Appeals For the Third Circuit	21
APPENDIX 2—Opinion and Order of the United States District Court For the Eastern District of Pennsylvania	25

CITATIONS

Cases:

PAGE

Bethlehem Steel Corporation v. *Grace Line, Inc.*, 416 F.2d 1096 (D.C. Cir. 1969) 11, 14, 15, 17

Crown Coat Front Co. v. *United States*, 386 U.S. 503, 512 (1967) 11, 13, 14

Far East Conference v. *United States*, 342 U.S. 570 (1952) 18

J. M. Huber Corp. v. *Denman*, 367 F.2d 104 (5th Cir. 1966) 17, 18

Land v. *Dollar*, 330 U.S. 731, 734, n.2 (1947) 19

Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949) 19

United States v. *Joseph A. Holpuch Co.*, 328 U.S. 234 (1946) 18

United States v. *Utah Construction and Mining Co.*, 384 U.S. 394, 405 (1966) 14

Miscellaneous:

R. Stern and E. Gressman, Supreme Court Practice (1969), § 4.19 19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner American Export Isbrandtsen Lines, Inc. (Export) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 19, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix 1 hereto. The opinion of the District Court for the Eastern District of Pennsylvania, not yet reported, appears in Appendix 2 hereto.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on October 19, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether, under a standard form of construction differential subsidy contract which contains a disputes clause giving the Maritime Administration exclusive and final jurisdiction to determine "all disputes" arising under the contract, a question of fact as to what work was to be performed under the provisions of that contract should be determined in the first instance by the Maritime Administration under the disputes clause.

Statutory Provision Involved

United States Code, Title 41:

§ 321. Limitation on pleading contract—provisions relating to finality; standards of review

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

Statement of the Case

The Contract Involved in the Dispute

On October 5, 1965, Sun Shipbuilding and Dry Dock Company (Sun), Export, and the United States of America acting through the Maritime Subsidy Board (MarAd), entered into a standard form of construction differential subsidy contract entitled "A Contract for the Reconstruction of the SS Transindia and the SS Transorient" (Reconstruction Contract) whereunder (i) Sun was to convert two nineteen year old vessels into containerships, (ii) the United States of America agreed to pay to Sun 46.3% of the cost "applicable to the conversion * * * and all authorized changes and all approved owner's expenses," and (iii) Export was to pay the balance.

The Reconstruction Contract consisted of Special Provisions, General Provisions and Plans and Specifications which had been approved by MarAd and the Department of the Navy.

Sun described the work to be performed under the Reconstruction Contract as a "complex and difficult task of simultaneously rebuilding and converting the vessels." All work thereunder was expressly required to conform to the "requirements of the various regulatory bodies."

The conversion of two nineteen year old vessels into containerships necessarily involved substantial rebuilding and renovation, the nature and extent of which could not have been fully ascertained until the work was in progress. However, that such work was fully anticipated is made manifest by Sun's acknowledgment "that the contract documents [Reconstruction Contract] on this job anticipated the addition of some ship repair work to the basic contract conversion work."*

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* The work which Sun has characterized as repair work or "repairs and overhaul" is not defined in the Reconstruction Contract.

The Reconstruction Contract (General Provisions, Article 4) required the Sun to proceed promptly with any changes in the Plans and Specifications directed by the Export; and it also contained provisions for effecting and processing such changes, all of which required the approval of MarAd, and provided that the prices of such changes were subject to being adjudicated as to fairness by MarAd.

The Special Provisions of the Reconstruction Contract [Article V] prohibited any changes whatsoever in the Plans and Specifications "directed by the Owner * * * unless approved by the Board [MarAd]"; and the General Provisions [Article 4] which supplemented the foregoing Special Provisions provided that "the Contractor [Sun] shall not depart from the requirements of the Plans and Specifications without prior written authorization by the Owner [Export] approved by the Board [MarAd]."

The Reconstruction Contract contemplated that Export would make numerous changes in the original Plans and Specifications which were not eligible for subsidy; and accordingly, Article VI(a)(iv) provided that Export was required to pay the total cost of all such changes "approved by the Board [MarAd] but not approved as eligible for construction-differential subsidy."

Section 1-4 of the Plans and Specifications of the Reconstruction Contract provided as follows:

> "It is the intent of the specifications, plans and other data furnished under the terms of the contract that the Contractor shall receive the ships, as is, perform necessary removals, carry out conversion work and deliver to the Owner a converted ship complete in all respects, complying with all the requirements of the several regulatory bodies of the United States and the other regulations listed herein, ready for service.
>
> "It is intended that the scope of this specification plan, and other data be limited to conversion require-

ments only; repair and overhaul of existing hull, outfit and machinery items reused in the conversion will be described in a separately issued specification and will be contracted for separately by the Owner.

"* * * and if any conflict occurs between the Contract [Special and General Provisions] and the specifications or plans, the Contract shall prevail."

Article 3 of the General Provisions of the Reconstruction Contract provided that if "any discrepancy, difference or conflict exists between the Special Provisions or the General Provisions of this contract and the Plans and Specifications, then to the extent of such discrepancy, difference or conflict only, the Plans and Specifications shall be ineffectual and the said Special Provisions or General Provisions shall prevail."

The Reconstruction Contract also contained a provision for the administrative adjudication of disputes arising thereunder, which is set forth in Article 36 of the General Provisions:

"* * * Disputes.—Any action, omission, direction, decision or determination of the Board, the Owner or the Contractor under this contract may be the subject of a dispute. Any dispute arising under this contract which is not disposed of by agreement of the parties to this contract, shall be decided by the Chief, Office of Ship Construction, of the Maritime Administration, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor and to the Owner, which decision shall be final and conclusive and shall bind all parties to this contract unless within thirty (30) days from the date of receipt of such copy the Contractor or the Owner appeals from said decision by mailing or otherwise furnishing said Chief, Office of Ship Construction, a written appeal addressed to the Board. * * *"

The Dispute

During the conversion of the vessels, over six hundred work orders were issued by Export in accordance with change procedures provided for under the Reconstruction Contract which, in fact, constituted changes in the original Plans and Specifications. Sun has lumped all these work orders, without distinction, into a single category which it characterized as "repairs and overhaul" and which it contends were performed under an alleged oral contract between Sun and Export separate and apart from the Reconstruction Contract.

Sun conceded, however, that the parties did not agree as to the prices of any of these items of "repair and overhaul" at the inception of the alleged oral agreement between Sun and Export, although it thereafter unilaterally placed a "reasonable value" on this work in the aggregate amount of $7,610,000.* Sun acknowledged that no separate specifications apart from the Specifications of the Reconstruction Contract were ever issued in connection with this "repair and overhaul" work.

It was and is Export's position that under the express terms and conditions of the Reconstruction Contract, no changes in the original Plans and Specifications relating to the conversion of the two vessels could be made without approval of MarAd, and that the prices of all changes in the Plans and Specifications, however characterized, were subject to adjudication as to fairness by MarAd.

Moreover, it is also Export's position, assuming *arguendo* that there was a separate oral contract covering what Sun has characterized as "repairs and overhaul," that a con-

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* Export paid Sun amounts aggregating $4,700,000 as enabling advances for "repairs and overhaul" under threats of Sun to discontinue work on the vessels; but such payments were made without prejudice and with the understanding that the ultimate prices would be adjudicated as to fairness by MarAd.

troversy would still exist as to (i) what work constituted "repairs and overhaul" and (ii) whether such work, or any part thereof, however characterized, was required to be performed under the Reconstruction Contract or as an "extra" pursuant to change orders thereunder; and that such a controversy, though raising factual questions, clearly arises under the disputes clause of the Reconstruction Contract and is not properly determinable by a jury.

That Sun was fully cognizant that all changes in the Plans and Specifications effected during the conversion of the vessels required MarAd's approval is evidenced by the following excerpt from a letter dated November 19, 1965, which Sun sent to Export as the work was progressing:

> "This letter is to bring up to date the list of Owner's items accrued on the conversion hulls. As you know, Article V of the Contract restrains Sun from doing any additional work on the ships unless authorized by A.E.I. [Export] and MarAd. . . ."

Moreover, Sun by letter dated December 9, 1965, advised Export that certain of the "repairs and overhaul" were eligible for construction differential subsidy and recommended that Export procure the approval of MarAd for such work prior to its commencement. Sun in so doing implicitly conceded that such work was to be performed under the Reconstruction Contract, and not under an alleged oral contract between Sun and Export, in that the United States of America is barred by law from making subsidy payments in connection with any contract to which it is not a party. MarAd, in fact, authorized the payment of a construction differential subsidy for certain of these items which Sun had characterized as "repairs and overhaul."

The dispute as to whether all or any part of the approximately six hundred work orders, which Sun characterized as "repairs and overhaul," were required to be

processed as change orders under the Reconstruction Contract, thereby making the prices of such work subject to adjudication by MarAd as to fairness, was submitted by the parties for adjudication under the disputes clause of the Reconstruction Contract.

On February 6, 1967, a decision of the Chief, Office of Ship Construction, sustained Export's position and held that 80% of the approximately six hundred items that Sun characterized as "repairs and overhaul," were required to be performed under the Reconstruction Contract, and that the prices of such work were subject to adjudication as to fairness by MarAd.

Sun filed a notice of appeal to the Maritime Subsidy Board from the above decision by invoking the appeals provisions of the disputes clause, but never prosecuted the appeal. More than two years thereafter Sun commenced the instant action against Export, grounded on diversity of citizenship, in the United States District Court for the Eastern District of Pennsylvania based upon the alleged oral contract between Sun and Export. Sun sought damages in the amount of $2,910,000, representing the balance allegedly due for "repairs and overhaul."

Export made a motion to the District Court to dismiss the cause of action or, in the alternative, to stay the prosecution thereof pending the exhaustion by Sun of procedures available to it under the disputes clause of the Reconstruction Contract.

Decisions Below

The District Court in an opinion and order dated August 5, 1970, denied Export's motion to dismiss the cause of action or in the alternative to stay its prosecution pending the exhaustion of the administrative procedures under the disputes clause solely on the basis of a conclusory assertion by an employee of Sun to the effect that all "repairs and overhaul" incident to the conversion were performed

under an alleged oral agreement between Sun and Export, separate and apart from the Reconstruction Contract and not subject to its terms. Indeed, the opinion of the District Court concluded that "But for this [the foregoing assertion], it is clear that Sun's claim for compensation for 'repair and overhaul' work would be a dispute 'arising out of' the conversion [reconstruction] contract, since Sun relies directly on the language in the specification which itself is a part of the conversion contract."

The District Court made no attempt to determine the nature or scope of the work covered by the approximately six hundred work orders which Sun had lumped into a single category and characterized as "repairs and overhaul," or whether all or any part thereof was required to be performed under the General Provisions, Special Provisions and Plans and Specifications of the Reconstruction Contract or the change procedures prescribed therein. Moreover, neither it nor the Court below discussed or even adverted to the fundamental issue of this action, *i.e.*, whether in the face of the disputes clause, the Courts should consider a question of fact or of mixed fact and law as to the scope of work to be performed under a government contract prior to the exhaustion of administrative disputes procedures.

Export appealed from the order of the District Court pursuant to Section 1292(a)(1), United States Code, insofar as it denied Export's motion to stay Sun from the prosecution of this action pending exhaustion of the administrative dispute procedures under the Reconstruction Contract.

Sun, contending that the order of the District Court was non-appealable, moved to dismiss the appeal. This motion was denied by the Court of Appeals by an order dated January 14, 1971. Thereafter, the Court of Appeals entered a judgment on October 19, 1971, upon a *per curiam* opinion of that date, affirming the decision of the District Court.

Other Proceedings Pending Before MarAd

In addition to the "repair and overhaul" dispute hereinabove mentioned, there are other proceedings presently pending before MarAd which demonstrate that the dispute pertaining to "repairs and overhaul" is properly the subject of adjudication by MarAd under the Reconstruction Contract.

Thus, Sun has filed and is pursuing a claim in the amount of $1,300,000 with the Division of Estimates (an agency of MarAd) seeking compensation attributable to delays resulting from changes in the Plans and Specifications of the Reconstruction Contract—a claim which includes the costs attributable to delays in effecting "repairs and overhaul" which Sun contends were performed under an alleged oral agreement between Sun and Export which was separate and apart from the Reconstruction Contract.

In addition, Export has made applications to MarAd which are presently pending seeking a determination as to the eligibility of certain "repair and overhaul" work for a construction differential subsidy, and to the extent the applications are granted (and some have already been approved), the United States of America will be obligated under the Reconstruction Contract to pay Sun 46.3% of the cost of such "repairs and overhaul". Yet the entire cost of such items of "repair and overhaul" are included in the damages sought by Sun in its action in the District Court.

Reasons for Granting the Writ

The decision below conflicts with decisions of this Court and other Courts of Appeals, and if allowed to stand will permit the circumvention of the administrative disputes procedures prescribed in a standard form of government contract to the detriment of an industry vital to the economic interests of the nation.

This controversy involves the interpretation and application of a disputes clause contained in a Maritime Administration standard form of construction differential subsidy contract, which has been described in the case of *Bethlehem Steel Corporation* v. *Grace Line, Inc.*, 416 F.2d 1096, 1107 (D.C. Cir. 1969), as "an important cog in the statutory machinery sustaining the vitality of the Nation's shipbuilding industry through governmental participation in the construction of commercial vessels in American shipyards."

The courts below erred in failing to hold that the issues of fact and mixed fact and law that are clearly involved in this action should be passed upon under the disputes clause by MarAd, an agency possessing the requisite expertise and entrusted with responsibility for national maritime policy.

This Court has made it abundantly clear that all adjudicative procedures under a disputes clause of a standard form of government construction contract must be exhausted prior to commencing an action at law. It has held that "It is now crystal clear that the contractor must seek the relief provided for under the contract or be barred from any relief in the courts" and that "No Court is justified in disregarding * * * the letter or spirit" of such a disputes clause. *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 512 (1967).

The decisions of the Courts below would open the door to the circumvention of procedures to administratively resolve disputes which are provided for in virtually all government contracts. Thus, by merely alleging the existence of a contract separate and apart from the government contract, a party would foreclose the administrative tribunal from applying its expertise in the first instance to resolve complex questions of fact and mixed fact and law arising under the government contract.

It is Export's contention that this work which Sun has characterized as "repairs and overhaul" was performed either under the original Plans and Specifications or in accordance with change order procedures of the Reconstruction Contract and was subject to its provisions, including the disputes clause.

Indeed, the Reconstruction Contract specifically required Sun to perform promptly any changes in the Plans and Specifications directed by Export, and after Export had directed Sun to perform what it characterized as "repairs and overhaul" MarAd approved of 80% (in value) of this work which constitutes the very items of work which are the subject matter of this action.*

It is impossible to justify the District Court's conclusion that a mere allegation by Sun that "repairs and overhaul" were to be performed under an oral agreement separate and apart from the Reconstruction Contract *ipso facto* removes the dispute from the scope of the disputes clause of the Reconstruction Contract in view of the fact that (i) the Dis-

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* MarAd's determination that certain of the work which Sun characterized as "repairs and overhaul" was eligible for subsidy is inconsistent with Sun's position that all of this work was performed under an alleged oral agreement between Sun and Export since the United States of America is foreclosed by law from making any subsidy payments under contracts to which it is not a party. There are still pending before MarAd applications for subsidy payments pertaining to certain other of the items of "repair and overhaul" which have not as yet been determined.

trict Court conceded that Sun's contention was predicated upon language in the specifications which were a part of the Reconstruction Contract and (ii) Export's position that all changes including "repairs and overhaul" were required to be effected within the ambit of the Reconstruction Contract of itself raised a question of fact under that contract.

However, the Court below, without requiring Sun to exhaust its administrative appeal procedures before MarAd, adopted the decision of the District Court, which relegated this disputed question of fact to a jury for its determination.

It is submitted that the decision of the Court below is in conflict with the rationale of the decision of this Court in *Crown Coat Front Co.* v. *United States, supra;* and although the primary issue in that case related to the application of the statute of limitations, this question in turn required an adjudication as to whether or not the dispute as to what work was required to be performed under a standard form of government contract was one arising under that contract and therefore susceptible of resolution under the procedures prescribed in its disputes clause.

In *Crown Coat Front,* the parties fully exhausted all administrative dispute procedures before an action at law was commenced to review the determination made by the administrative tribunal, and although this Court remanded the question to the District Court, the scope of its review was necessarily limited by the Wunderlich Act (41 U.S.C. §§ 321, 322).

Unlike the *Crown Coat Front* case, in which all available administrative disputes procedures were exhausted prior to the commencement of an action at law, Sun, after receiving an initial adverse decision by MarAd under the Reconstruction Contract, failed to exhaust administrative appellate procedures, and approximately two years thereafter, commenced a plenary action in the District Court.

Sun in so doing did not request the District Court to adjudicate whether the decision made by MarAd was within the limitations prescribed by the Wunderlich Act but to adjudicate the entire question *de novo*. Indeed, in this litigation, the dispute was relegated to a jury for determination.

Certainly, the procedure being pursued by Sun, which was sanctioned by the Court below, is diametrically opposed to the position of this Court that administrative appeal procedures in government contracts must be exhausted before resort to the courts is permitted.*

The decision of the Court below is also in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Bethlehem Steel Corporation* v. *Grace Line, Inc.*, 416 F.2d 1096 (1969), which significantly also involved a dispute between a shipbuilder and a shipowner over the terms of a MarAd tripartite government-subsidized ship construction contract containing the identical disputes clause provision as is involved in the instant case.

The rationale of the *Bethlehem Steel* case followed the settled rule in disputes clause cases, and acknowledged MarAd's exclusive jurisdiction to determine questions of fact concerning the scope of the contract.

The Court of Appeals in the *Bethlehem Steel* case reversed a decision of the District Court which had denied a stay of an action at law pending exhaustion of disputes clause procedures prescribed by a MarAd standard form

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* The disputes clause involved in this standard form of Maritime Administration contract is broader in scope than the disputes clauses heretofore construed by this Court in *Crown Coat Front Co.* v. *United States, supra*, and in *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 405 (1966), which covered only disputes of fact. The clear and explicit language of the disputes clause contained in the contract involved in this litigation manifestly covers disputes involving both questions of law as well as fact—subject only to statutory limitations as to finality imposed by the Wunderlich Act, 41 U.S.C. §§ 321, 322.

construction differential subsidy contract (the same relief requested by Export). The Court, in arriving at its decision, reasoned as follows (416 F.2d at 1106, 1108-1109):

> ". . . [I]n our view, the court can and should initially refer the dispute to the Administration [MarAd], retaining jurisdiction to review its decision and pass final judgment on the matter.
>
> "That course would comport well with the fundamental policy underlying the well settled rule that claims referable under the disputes clause for administrative adjustment cannot be entertained judicially until the required administrative procedures have been exhausted.
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> * * *
>
> "That it has not yet been determined whether the authority to decide the . . . dispute resides in the Maritime Administration or in the District Court is not a barrier to a reference. Again analogizing the doctrine of primary jurisdiction,
>
> > * * * in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined."

The salutary holding of the *Bethlehem Steel* decision with which the Court's decision below conflicts is that, unless it is clear as a *matter of law* that a dispute *is not* one arising under the contract, any action at law involving such a dispute must be stayed pending MarAd's adjudication. If there is any question of fact that the dispute is one arising under the contract, that question must be resolved by MarAd. (416 F.2d at 1104-05).

The Courts below adopted a contrary position and held that such a stay should not issue unless it is clear as a matter of law that the dispute *is within* the disputes clause. Accordingly, under such a holding any question of fact must be resolved by a jury rather than by MarAd even though it is a question of fact as to what work was required to be performed under the Reconstruction Contract.

The District Court below conceded that a factual dispute existed as to whether the approximately six hundred work orders which Sun characterized as "repairs and overhaul" were performed under an oral contract as alleged by Sun and relegated this dispute to a jury for determination.

It is Export's contention that this identical work was intended to be and was in fact covered under the provisions of the Reconstruction Contract. It is apparent that the fundamental question to be resolved is one of fact as to exactly what work was required to be performed under the Reconstruction Contract and the change order procedures provided for thereunder; and clearly this is a dispute arising under the contract and subject to the disputes procedure provided for therein.

It would appear that the District Court's decision is grounded on semantics and does not reflect the substance of the dispute between the parties which is inescapably a factual question. It is uncontrovertible that, however characterized, the task which the District Court relegated to a jury was to determine the scope of work performed within the Reconstruction Contract. Export maintains that the six hundred odd work changes were subject to the Reconstruction Contract, while Sun denies this. To the extent a jury were to agree with Sun, it would necessarily be defining the scope of the Reconstruction Contract work, thus performing a task the parties had contracted to give to MarAd. Even assuming *arguendo* that the dispute involved both a question of fact and mixed fact and law,

such a dispute is clearly within the broad scope of the disputes clause of the Reconstruction Contract. Indeed, even if it were assumed that the issue presented to the District Court is solely a question of law, the Courts below erred in relegating this issue to a jury, since such an issue would clearly be exclusively within the Court's province.

The rationale of the *Bethlehem Steel* case is in accord with the principle of law which empowers an administrative tribunal in the first instance to determine the question of its own jurisdiction. One case so holding is *J. M. Huber Corp.* v. *Denman*, 367 F.2d 104 (5th Cir. 1966), which involved the jurisdiction of the Federal Power Commission to determine the market price of gas. The defendant in that case, however, challenged the jurisdiction of the Federal Power Commission to make such a determination. The following excerpt from the opinion of the Court in staying judicial proceedings pending a determination by the Federal Power Commission of its own jurisdiction is particularly relevant (367 F.2d at 111-112);

> "[T]he FPC urges that since it is *arguable* that the matter is within its jurisdiction both the question of *jurisdiction* and, if it exists, the appropriateness of the exercise of such power, are matters for primary jurisdiction referral to the FPC for initial decisions.
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> "We find ourselves in substantial agreement with the FPC.
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> • • • • •
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> "[T]here is really nothing startling about submitting to an agency for initial decision the question of its own jurisdiction. That this ultimately is a question of law, probably one of statutory construction, is not fatal.
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> • • • • • •
>
> "To the contrary, justification for judicial deferral of the jurisdictional question for initial resolution by an agency is even stronger than for a non-jurisdictional question." (Emphasis in original)

The principle of "primary jurisdiction" was set forth by this Court in the leading case of *Far East Conference* v. *United States*, 342 U. S. 570 (1952), which involved a civil antitrust action by the United States in which the defendant moved for dismissal contending that the Federal Maritime Board should be afforded the opportunity to rule on the legality of a dual-rate agreement among shippers before judicial intervention was permitted. The United States argued that the Federal Maritime Board had no authority to approve such an agreement. This Court held that an initial reference to the Federal Maritime Board for its determination was mandatory and dismissed the action at law, stating (342 U.S. at 574-75):

> "Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

Although the courts in cases involving the exhaustion of administrative remedies and the doctrine of primary jurisdiction are more frequently concerned with administrative proceedings pertaining to statutory and regulatory schemes rather than contract disputes, this Court in the case of *United States* v. *Joseph A. Holpuch Co.*, 328 U. S. 234 (1946), has explicitly ruled that the exhaustion doctrine is applicable to government contract disputes clauses.

The rule laid down by the Court below would abrogate the supremacy of MarAd as the finder of fact—which tribunal has been invested with that power by the parties, by statute and by the decisions of this Court. Moreover, it sanctions a specious device whereby all a party to a Government contract would need to do in order to thwart

a disputes clause procedure is to allege "I performed work under a separate oral contract which is not covered by the disputes clause." Patently, this decision would substantially impair a procedure which permits the expeditious adjudication of highly complex questions of fact and mixed fact and law in the light of the experience and insight of the contracting agency, and would relegate these questions to the Court—not for a limited review of an administrative decision as permitted under the Wunderlich Act, but for *de novo* consideration.

The interlocutory nature of an action is no bar to certiorari "when there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari. . . ." R. Stern and E. Gressman, Supreme Court Practice (1969), § 4.19, citing *inter alia Land* v. *Dollar*, 330 U.S. 731, 734, n.2 (1947) and *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949).

This principle is particularly applicable to the instant case, in that a reversal of the Court below would not only be dispositive of this enormously complex and protracted litigation, but would permit the continued effective utilization by MarAd of an administrative disputes procedure to resolve the highly complex and technical disputes arising in the shipbuilding industry.

If the decision below is permitted to stand, its disruptive impact on the validity and efficiency of disputes clause procedures will not be limited to this particular case or merely to MarAd's standard form contract, but will also extend to the entire vast field of government contract litigation, and expert agencies will be displaced as the determiners of these questions throughout that entire field.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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December 9, 1971.

APPENDIX 1

Opinion of the United States Court of Appeals For the Third Circuit

SUN SHIPBUILDING AND DRY DOCK COMPANY

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 4, 1971

Before: MCLAUGHLIN, GANEY, and ADAMS,
Circuit Judges

OPINION OF THE COURT

(Filed October 19, 1971)

PER CURIAM:

American Export Isbrandtsen Lines [Export] has appealed to this Court from the District Court's denial of a stay of its proceedings pending an adjudication before the Maritime Administration [MarAd].

In October, 1965, Sun Shipbuilding and Dry Dock Company [Sun], Export and the United States entered into a written agreement for the conversion of two regular cargo ships into containerships. Because of the age of the two ships (19 years), it was apparent to all parties from the

outset that significant repair and overhaul work had to be accomplished in addition to the work necessary for the conversion of the two vessels. The United States was to pay 46.3% of the cost of the work relating to the conversion. Export, on the other hand, was required to pay the full price of all repair and overhaul work unrelated to the conversion. To this end, the parties inserted in the written agreement the following clause:

> "It is intended that the scope of this specification, plans and other data be limited to conversion requirements only, repair and overhaul of existing hull, outfit and machinery items reused in the conversion will be described in separately issued specifications and will be contracted for separately by the owner [Export]."

Prior to the completion of work on the ships, Export announced that it was unwilling to pay for the repair and overhaul work absent an adjudication on the fairness of prices by MarAd. Export then invoked the "disputes clause" of the written agreement and submitted the controversy to the Chief, Office of Ship Construction, MarAd, who found the dispute to be within his jurisdiction. After an appeal to the Maritime Subsidy Board, which appeal is still pending, Sun filed this suit in the District Court to recover damages for overhaul and repair work—unrelated to conversion—which it had done on the ships. In support of its claim, Sun submitted the affidavit of William Watson, its Chief of Staff Engineering, which stated that Sun and Export had entered into an oral agreement for the repair and overhaul work which specifically stated that the parties to the oral agreement were not to be bound by any of the terms of the prior written agreement.

Export, in response, filed an affidavit of John E. Bone, who is in charge of its technical and planning services, presenting allegations, which, if true, showed that the "disputes clause" of the written agreement would require Sun and Export to proceed with an adjudication by MarAd

as to the fairness of Sun's prices for repair and overhaul work unrelated to the conversion. Treating Export's motion as one for summary judgment, Judge Fullam stated,

> "In this posture it is clear that a dispute of material fact exists as to whether or not Sun and Export did form a binding contract concerning the repair and overhaul work which provided that the terms of the original conversion contract were not applicable."

The District Court ordered a trial limited to the issue whether such an oral agreement had, in fact, been consummated and refused to grant Export's motion for a stay.

If the District Court finds that Sun and Export did enter into the agreement alleged in the Watson affidavit, then it would be proper for it to proceed with the Sun action. We, therefore, remand the case to the District Court so that the trial contemplated in its opinion may take place as promptly as the Court's calendar will permit.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT OF THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

[SAME TITLE]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, GANEY AND ADAMS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 7, 1970, be, and the same is hereby affirmed, and the cause remanded to the said District Court so that the trial contemplated in its opinion may take place as promptly as the said Court's calendar will permit, in accordance with the opinion of this Court. Costs taxed against appellant.

ATTEST:

THOMAS F. QUINN,
Clerk.

October 19, 1971.

APPENDIX 2

Opinion of the United States District Court For the Eastern District of Pennsylvania

August 5, 1970

FULLAM, J.:

This is a contract action in which two independent claims are asserted for monies allegedly owed the plaintiff-contractor for work performed on two of the defendant's vessels. The defendant has filed a motion to dismiss supported by an affidavit and pertinent documents. Plaintiff has filed opposing affidavits. Therefore, defendant's motion to dismiss will be treated as a motion for summary judgment. Fed.R.Civ.P.12(b), where appropriate.

On October 5 ,1965, Sun and Export signed a fixed price contract for conversion of two dry-bulk cargo vessels to containerized ships. The United States through the Maritime Subsidy Board (hereinafter Maritime) was also a party to the contract. In accord with federal policy, Maritime agreed to subsidize a percentage of the cost of the conversion contract. Under the terms of the contract, Maritime was obligated to make its pro-rata payments directly to Sun.

The conversion contract has been performed, and all matured payment obligations have been satisfied. In the present litigation Sun seeks to recover Export's pro-rata share of the installation cost of partial floors in the bottoms of both vessels. Sun claims this work was an extra or a compensable change under the conversion contract. This precise claim has been fully litigated under the disputes provision of the conversion contract, and decided adversely to Sun.

It is conceded by the parties that in addition to performing the conversion contract, Sun performed general repair and overhaul work on the vessels. Sun's second claim

seeks compensation for this work. The disagreement between the parties relates to whether the amount of compensation must be determined pursuant to the procedures set out in the disputes article of the conversion contract. If the disputes article is applicable, the present action in this Court would be premature.

By way of further background, the documents submitted in support of Export's motion to dismiss make it apparent that by December of 1967 the parties had reached an impasse concerning the manner in which repair and overhaul compensation would be determined. Export, thereafter, invoked the disputes procedure. The issue was framed in terms of whether or not the repair and overhaul work was owner's work under Article V of the Special Provisions of the conversion contract. After both parties had submitted position papers, the Chief, Office of Ship Construction, of Maritime, concluded that all repair and overhaul items which had been submitted to Maritime for approval and approved constituted owner's work under the conversion contract, and any other repair and overhaul work was not owner's work. Sun, in accord with the disputes article, notified the appropriate parties that it intended to appeal the Chief's ruling.

The defendant's motion to dismiss will be considered separately as to each of plaintiff's claims.

I

The conversion contract has three parts: the standard construction differential contract used by Maritime, the special provisions section, and the plans and specifications for the conversion work. The only reference to repair and overhaul work in the contract documents is found in the specifications at page 1-3.

> "It is intended that the scope of this specification plan and other data be limited to conversion requirements only; repair and overhaul of existing hull,

> outfit and machinery items reused in the conversion will be described in a separately issued specification and will be contracted for separately by the Owner [Export]."

An affidavit of Sun's Chief of Staff Engineering, William Watson, states that, in conformity with the terms set out above, Sun and Export agreed "that all such repair and overhaul work will be accomplished under separate agreement not a part of [the conversion contract] *or subject to its terms.*" (emphasis supplied).

On the other hand, it seems to be Export's contention that the language in the specification contemplated separate agreements relating only to *what* repair and overhaul work was to be done, but all other provisions of the conversion contract would be applicable. Under this theory, Sun would have to litigate its claim for repair and overhaul compensation pursuant to the terms of the disputes article of the conversion contract before resort to this Court would be proper.

In this posture it is clear that a dispute of material fact exists as to whether or not Sun and Export did form a binding contract concerning the repair and overhaul work which provided that the terms of the original conversion contract were not applicable. Therefore, it is impossible to grant the defendant's motion.

I wish to make it clear that the sole basis of my ruling is the statement in the Watson affidavit. But for this, it is clear that Sun's claim for compensation for repair and overhaul work would be a dispute "arising out of" the conversion contract, since Sun relies directly on the language in the specification which itself is part of the conversion contract.

The defendant has repeatedly made the alternative argument that the plaintiff is estopped from bringing this action, because it participated in an administrative proceeding pursuant to the disputes clause of the conversion

contract relating to the repair and overhaul work. This position is factually unsupported, because the record is eminently clear that the dispute proceeding was *initiated* at the request of Export, and that Sun from the outset contended that the repair and overhaul work was not controlled by the conversion contract.

Export makes a final argument based on a similar estoppel theory. Neither vessel was completed and delivered to Export within the period set out in the original conversion contract. Under the terms of the conversion contract, extensions of the delivery date were to be determined after delivery, and there is presently pending before Maritime a request by Sun for extensions of the delivery dates. One of Sun's primary justifications for the delays in delivery is the extensive nature of the repair and overhaul work which was performed by Sun. From these facts, Export argues that the present action must be dismissed, or at least stayed, because Sun cannot litigate the extension of delivery-date question before the administrative tribunal while simultaneously litigating this lawsuit. Unfortunately, Export has not supplied any reason why this conclusion should follow.

It must be recognized that if Sun proves the contract set out in the Watson affidavit, litigation in this Court would be precisely what the parties bargained for by not choosing to utilize some form of arbitration. In light of the above, it appears that the most expeditious means of resolving this controversy is to sever the issue of the "Watson contract" from all other issues and try that issue first.

I also reject Export's contention that the United States is an indispensable party under Fed.R.Civ.P. 19(b). The whole thrust of the plaintiff's claim is that the plaintiff and defendant entered into a contractual agreement for the repairs and conversion work, disassociated from the conversion contract. The only possible way the United States might become involved would be if Export were

to seek subsidy payments for certain items of the repair and overhaul work. But that is a separate matter. Maritime would either allow or disallow the subsidy according to its standards; and in the event certain items were allowed, any determination of the value of the work in this Court would not be binding on Maritime.

II

In the early stages of Sun's performance of the conversion contract, detailed working drawings were submitted to the American Bureau of Shipping for approval. The plans were approved subject to the qualification that partial floors had to be installed in the bottoms of both vessels. Sun installed these floors without ever receiving approval of Maritime.

A dispute then arose then as to whether Sun was entitled to additional compensation under the fixed price conversion contract for this work. The disputes article was invoked and the Chief, Office of Ship Construction, found that Sun was not entitled to any additional compensation. An evidentiary hearing was then held before a trial examiner, who found in Sun's favor. However, Maritime reversed the hearing examiner's determination and affirmed the Chief, Office of Ship Construction. The Secretary of Commerce then denied Sun's petition for review of Maritime's decision.

Export's first contention is that this count must be dismissed because Sun's complaint is not drafted in accord with the finality provision of the disputes article. However, on October 27, 1969, Sun filed an amended complaint, paragraph 18 of which alleges that the administrative decision was arbitrary, capricious and not supported by substantial evidence. Since Export has not yet filed an answer, Sun's amendment did not need court approval. Fed.R.Civ.P. 15(a). Therefore, it would appear that the defect in Sun's pleading has been cured, and the complaint cannot be dismissed on this basis.

However, Export makes the additional contention that the complaint even as amended must be dismissed because no specific factual basis is alleged in support of the general allegations of paragraph 18 of the complaint. It is true that when a summary judgment motion is addressed to a contractor's claim that the administrative action pursuant to the disputes clause is arbitrary, capricious or not supported by substantial evidence, the Court of Claims has held, *Volentine & Littleton* v. *United States*, 145 F. Supp. 952 (1956); *National Electronic Laboratories, Inc.* v. *United States*, 180 F. Supp. 337 (1960); *P.L.S. Coat & Suit Corp.* v. *United States*, 180 F. Supp. 400 (1960), that the plaintiff cannot rely merely on the general boiler-plate allegations of his complaint. Export's present contention goes one step further than this. If I were to grant Export's present motion, I would in effect be holding that an original complaint seeking review of an administrative action pursuant to a disputes clause must be dismissed for failure to state a cause of action merely because there are no specific factual allegations in the complaint. I do not understand this to be the law. However one chooses to label the defendant's present motion, it is effectively, on this point, a motion to dismiss for failure to state a cause of action. The plaintiff has stated a cause of action in this case and the complaint cannot now be dismissed.

In sum, this case does not differ from a normal situation where a contractor seeks review of an adverse determination by a government contract board. The role of this Court in adjudicating Sun's claim is "principally a review function." *Crown Coat Front Co., Inc.* v. *United States*, 380 U. S. 503, 513 (1967) based upon the administrative record. *United States* v. *Anthony Grace & Sons, Inc.*, 384 U. S. 424 (1966); *United States* v. *Carlo Bianchi Co., Inc.*, 373 U. S. 709 (1963).

Moreover, the parties are in apparent agreement that even under the disputes article questions of law decided

by the administrative body are not accorded finality. That is, even accepting the factual findings made by Maritime, this Court would be free to reach a different conclusion based upon a legal question. This is the traditional dichotomy which is created by the Wunderlich Act, 41 U.S.C. §§ 321-22. Of course, since this suit is not against the United States, the Wunderlich Act is not directly applicable. It is, however, clear that this is the review which the parties contemplated in the original contract and, therefore, this is the review that this Court is obliged to perform.

Export also contends that this Court cannot entertain Sun's action, even on this limited basis, because the United States is an indispensable party under Fed.R.Civ.P. 19(b). Before examining Sun's contention, the unusual jurisdictional questions involved in this case should be mentioned.

The United States District Courts and the Court of Claims exercise concurrent jurisdiction over contract claims against the government up to $10,000; however, only the Court of Claims has jurisdiction over contract claims exceeding $10,000 in controversy. On the face of plaintiff's complaint, the government's potential liability as a contracting party is $53,350.66. Consequently, if the government is an indispensable party, and the government were to be joined, this Court would not have subject matter jurisdiction over Sun's claim against the government, and the case would have to be dismissed.

Be that as it may, the present issue is whether or not the United States is an indispensable party under rule 19. *See Provident Tradesman Bank & Trust Co. v. Patterson*, 390 U. S. 102 (1968). The conclusions and convenient labels used by Export to support its contention are not sufficient to carry Export's burden, as the moving party, to demonstrate that the United States is, in fact, an indispensable party. The *Provident* case is crystal clear that a rule 12(b)(7) motion should be granted only

upon a thorough and precise analysis of all the criteria set out in rule 19.

Moreover, because of the unique question involved in this aspect of the case, I am not inclined to undertake the proper rule 19 analysis on my own motion. Therefore, Export's motion will be denied.

Order of the United States District Court for the Eastern District of Pennsylvania, Dated August 5, 1970.

AND NOW, this 5th day of August, 1970, it is ORDERED that:

1. The defendant's motion to dismiss Count I of the complaint filed pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(7) is DENIED.

2. Unless otherwise directed by the trial judge, the issue of whether a binding oral contract was entered into between the parties as set out in the Watson affidavit is severed from all other issues associated with Count I and shall be tried first.

3. The defendant's motion to dismiss Count I is DENIED, without prejudice to renewal of a defense motion to dismiss for failure to join an indispensable party under rule 19.

JOHN P. FULLAM
J.

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Supreme Court, U.S.
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JAN 13 1972
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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-753.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
Petitioner,

v.

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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January 10, 1972.

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INDEX.

	Page
Introductory Statement	1
Brief Summary of Relevant Facts	2
Reasons for Opposition to the Petition	4
Conclusion	5

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

INTRODUCTORY STATEMENT.

The respondent Sun Shipbuilding & Dry Dock Company ("Sun") respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed by American Export Isbrandtsen Lines, Inc. ("Export") be denied.

Sun feels that there is no substance to Export's contentions, the reiteration of which has delayed any progress on the merits of the matter for over two and one-half years. The Court below, as indicated by its *per curiam* opinion, is in agreement with this view. Accordingly, Sun will not rebut in detail the many legal and factual assertions made by Export but will briefly attempt to put this case in proper perspective.[1]

1. As to the facts, in spite of Sun's constant correction, Export has stated at every level, including its Petition to this Court certain of its controverted allegations as settled facts.

BRIEF SUMMARY OF RELEVANT FACTS.

The contract in question provided for the reconstruction of two ore-carrying vessels. In its haste to put into operation ships capable of transporting containerized cargo, Export opted for converting the two existing vessels to this specialized use rather than having completely new ships fabricated. Assumedly because of its like interest in promoting container traffic, the Maritime Administration ("MarAd"), an agency within the Department of Commerce, atypically agreed to participate in the cost of the conversion work even though it was not new construction. This was the first such subsidized conversion, and the MarAd standard form of construction differential subsidy contract had to be adapted accordingly. The most significant addition was a clause in the Specifications, quoted by Export at pp. 4-5 of its Petition, which stated explicitly that only the conversion work as described in the Plans and Specifications was covered by the contract; any general repair work which the Owner desired to be performed to the existing hull was to be contracted for separately without MarAd involvement. Thus, MarAd maintained its historical practice of non-participation in mere repair work.[2]

In due course Sun and Export contracted for and Sun performed voluminous repairs in the manner that is normal for such work—through oral directives and written work orders signed by a representative of the Owner. This procedure was, of course, in sharp contrast to that strictly provided for changes to the Plans and Specifications of

2. This important point completely distinguishes the many government contract cases relied upon by Export. Under the allegations of Sun's Complaint and supporting Affidavits, which must be accepted as true at this point, this is not a dispute between the United States and its Contractor. On the contrary, it is a conflict solely between two private parties.

the subsidy contract which required that prior approval be granted by MarAd. However, Sun and Export have been unable to agree on a price for the repair work performed, and therefore Sun filed suit for the amount it considered reasonable. In answer to Export's protestations that only the Maritime Administration had jurisdiction to adjudicate this question of price, the District Court below refused to dismiss or stay the action but ordered that an initial limited trial be held solely on the issue of whether a private repair contract was indeed entered into by Sun and Export separate and apart from the construction differential subsidy conversion contract.

REASONS FOR OPPOSITION TO THE PETITION.

Aside from the correctness of the District Court's denial of Export's Motion to Dismiss or Stay and the Court of Appeals' subsequent affirmance, there are two factors which bear on consideration of Export's Petition For a Writ of Certiorari. First, the District Court's ordering of a limited trial was eminently reasonable. That procedure also appears to have found favor with the Court of Appeals. In the unlikely event that Sun is unable to establish a basis for court jurisdiction, as it has alleged in its Complaint and Affidavits, a minimum of time will have been lost.

Second, contrary to the preposterous statements in Export's Petition, the resolution of this case will have no impact beyond the purely monetary interests of Sun and Export. A court decision will certainly not undermine MarAd procedures and will not have a detrimental impact on the whole field of government contracts. This case is a sport: it involves a unique situation arising out of the first subsidized ship conversion. In subsequent instances when it chose to subsidize conversions MarAd included in the contract's Special Provisions a clause which, if it is possible, indicated even more clearly than its predecessor clause in the Export Specifications that MarAd rejected any involvement whatsoever in repair work that the Owner might wish accomplished simultaneously with the conversion. Furthermore, there is presently under consideration the adoption of a totally new standard MarAd construction contract which withdraws MarAd from the disputes arena as much as possible. The instant controversy could only arise where there is a three-party government contract (to the best of Sun's knowledge, confined to the subsidized shipbuilding area) and where government contract work as well as private work is being performed on the

same subject matter by and for the same parties. Obviously government contractors would not sue in court alleging the existence of a private contract, and "bypassing" their administrative remedies, unless such an allegation could be supported, in which case judicial jurisdiction would be entirely appropriate.[3]

The Courts below have handled the matter properly and in a manner designed to expedite the resolution of this conflict. Sun's case has now been pending for more than two and one-half years, and the time for legal skirmishing is through. The matter should be remanded to the District Court for a trial on the merits.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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PEPPER, HAMILTON & SCHEETZ,
Of Counsel.

January 10, 1972.

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3. Here there is no standard contract, which requires interpretation, no agency whose regulatory program will be affected in the least. Indeed, although aware of this action, MarAd has not seen fit to intervene or participate in any way.